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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5980

WAYNE CARL COLEMAN,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,
Georgia State Prison,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF TATTNALL COUNTY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-

WAYNE CARL COLEMAN,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,
Georgia State Prison,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF TATTNALL COUNTY

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Tattnall County, Georgia entered on June 13, 1980. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia October 31, 1980.

CITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Georgia Supreme Court October 31, 1980. The order of the Georgia Supreme Court and the unreported opinion of the Superior Court of Tattnall County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Tattnall County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied October 31, 1980. Pursuant to Rule 20 of the Rules of the Supreme Court the time for this petition runs from the denial of review issued by the Georgia Supreme Court October 31, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix E hereto:

Georgia Code Ann. §26-1101

Georgia Code Ann. §38-801(e)

Georgia Code Ann. §50-127

Georgia Code Ann. §24-4526

QUESTIONS PRESENTED

-1-

Whether Georgia Code Ann. §38-801(e) (Ga. L. 1966, p. 502, as amended) insofar as it limits the subpoena power within the State of Georgia to 150 miles of the hearing, violated Petitioner's Fourteenth Amendment rights to due process of law and Sixth Amendment right to compulsory process to compel the attendance of witnesses on his behalf.

-2-

Whether the trial court's charge to the jury violated Petitioner's Fourteenth Amendment right to due process of law in that it created an improper presumption and relieved the State of Georgia of the burden of proof as to an essential element of the offense charged.

HOW THE ISSUES WERE RAISED BELOW

-1-

Prior to the hearing on Petitioner's state petition for writ of habeas corpus, Petitioner moved the habeas corpus court to declare unconstitutional Georgia Code Ann. §38-801(e) insofar as it limits subpoena power within the State of Georgia to 150 miles of the hearing. The court denied the motion, specifically finding the statute to be constitutional. The constitutional issues were raised again on appeal to the Supreme Court of Georgia which affirmed the judgment of the habeas corpus court.

-2-

Petitioner's amended petition for writ of habeas corpus raised the issue of the constitutionally impermissible jury charge at Petitioner's trial. The habeas corpus court found this allegation to be without merit, finding no constitutional infirmity in the jury charge. The constitutional issues were raised again on appeal to the Supreme Court of Georgia which affirmed the judgment of the habeas corpus court.

-3-

STATEMENT OF THE CASE

On September 4, 1973, Petitioner, Wayne Carl Coleman and co-defendants Billy Isaacs, Carl Isaacs and George Dungee were indicted for murder in the May 14, 1973 deaths of six members of the Alday family in Donalsonville, Seminole County, Georgia.

Petitioner was tried on this indictment in Seminole County on January 18, 1974, two weeks after the trial and conviction of Petitioner's co-defendants in the same county. Seminole County has a population of seven thousand people.[1]

The trial court instructed the jury as set out in Appendix C hereto; included in the court's charge, was the following instruction to the jury:

> A crime is a violation of a Statute of this State in which there shall be a union of joint operation of act and intention.
> The acts of person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.
> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.
>
> T Trial 1033

After some deliberations the jury foreman requested a rereading of the charge (T Trial 1038). The charge was repeated including the above-stated instruction (T Trial 1041).

Petitioner was convicted of six counts of murder and sentenced to death.

The convictions and sentence were affirmed by the Supreme Court of Georgia. Coleman v. State, 237 Ga. 84,

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1. Coleman v. State, 237 Ga. 84, Hill, J., dissenting.

226 S.E. 2d 91 (1976). Certiorari was denied by this Court, Coleman v. Georgia, 431 U.S. 909 (1977); rehearing denied 431 U.S. 961 (1977).

Subsequently, a state petition for writ of habeas corpus was filed in the Superior Court of Tattnall County, Georgia, challenging the legality of Petitioner's convictions and sentence. Prior to the habeas coprus hearing, Petitioner moved the court to declare unconstitutional Ga. Code Ann. §38-801(e) insofar as it limits subpoena power within the State of Georgia to 150 miles of the site of the hearing.

Petitioner stated that he intended to call witnesses from Seminole County and Atlanta, Georgia, each more than 150 miles from the site of the hearing, to prove allegations made in his petition for writ of habeas corpus.

Petitioner, through his counsel, submitted an offer of proof to the court listing names and expected testimony of witnesses whose attendance at the hearing could not be secured because of the 150 mile limit on Petitioner' subpoena power. The affidavit and offer of proof is set out in Appendix D hereto. The habeas corpus court held that the statute was constitutional regardless of what witnesses Petitioner intended to call.

The court denied the petition for writ of habeas corpus. Petitioner applied to the Supreme Court of Georgia for a certificate of probable cause to appeal. The Georgia Court, affirming the lower court, denied the application October 31, 1980.

REASONS FOR GRANTING THE WRIT

1. GEORGIA CODE ANN. §38-801(e) INSOFAR AS IT LIMITS THE SUBPOENA POWER WITHIN THE STATE OF GEORGIA TO 150 MILES OF THE HEARING VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES ON HIS BEHALF.

The State of Georgia provides an incarcerated person the right to petition for writ of habeas corpus to determine the legality of his conviction and sentence. Ga. Code Ann. §50-127. This right is rendered meaningless by the impact of Ga. Code Ann. §38-801(e) (Ga. L. 1966, p. 502, as amended) which limits the range of in-state subpoena power to 150 miles. Petitioner's material witnesses were located in Atlanta and Seminole County, Georgia, each located more than 150 miles from Tattnall County, Georgia, the site of Petitioner's state habeas corpus hearing (T Habeas Corpus Vol. I, 15-18). The provisions of Ga. Code Ann. §38-801(e) worked to deprive Petitioner of a full and fair state habeas corpus proceeding.

"The right to offer the testimony of witnesses and to compel their attendance if necessary...is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972).

As this Court has stated concerning the companion Sixth Amendment right to confront witnesses, its denial or significant deminution calls in to question the ultimate integrity of the fact-finding process and requires that any competing state interest be closely examined. See, e.g. Barker v. Page, 390 U.S. 719 (1968); Burger v. California, 393 U.S. 314 (1969). The only state interests which can be offered by the State of Georgia to justify the limitations on in-state subpoena power are the less significant interests of witness convenience or lessening of costs.

In Lawrence v. Henderson, 344 F. Supp. 1287 (E.D. La. 1972), that court found a situation where the defendant had attempted to serve a witness subpoena upon an inmate at a prison. Prison officials refused to allow the witness' compliance.

In holding these facts to constitute a violation of the right to compulsory process, the District Court stated:

> "The record is barren as to the reason for the denial of compulsory process. Petitioner may have had it denied him through inadvertance or other innocent reason. The cause of the denial, however, is immaterial. It is the resulting inability to compel [the witness] to testify which is unconstitutuional."
>
> 344 F. Supp. at 1295.

Petitioner, an indigent person incarcerated by the State of Georgia, made every possible alternative effort to secure the testimony of the necessary witnesses. Petitioner moved the habeas corpus court to provide him with funds to take the oral depositions of the witnesses in their home county and to present these depositions as evidence as allowed under the provisions of Ga. Code Ann. §50-127(7)(a) (T Habeas Corpus Vol. I, 29).

The alternative motion was denied by the habeas corpus court (T Habeas Corpus Vol. I, 36). Petitioner was left with no means to present evidence in support of his petition for writ of habeas corpus.

The State of Georgia, under the Fourteenth Amendment, is required to provide meaningful access to its courts. Bounds v. Smith, 430 U.S. 817 (1977). Whatever the constitutional obligation of a state might be to provide post-conviction remedies to incarcerated persons, it is clear that once a system of post-conviction relief has been adopted, it must be administered to provide a full and fair hearing to incarcerated persons.

This Court in an extended line of cases, has reversed and remanded state court decisions in which incarcerated persons' post-conviction claims had been rejected without such a hearing. See, Pyle v. Kansas, 317 U.S. 213 (1942); Pennsylvania ex rel. Hermann v. Claudy, 350 U.S. 116 (1956); Sublett v. Adams, 362 U.S. 143 (1969); Wilde v. Wyoming, 360 U.S. 607 (1960); McNeal v. Culver, 365 U.S. 109 (1961); Bushnell v. Ellis, 366 U.S. 418 (1961).

In the present case, the Georgia law restricting Petitioner's ability to compel the attendance of witnesses, created a de facto barrier to Petitioner's assertion of his constitutional claims and rendered meaningless the formal access to post-conviction relief afforded him.

The Georgia habeas corpus procedure is a procedure that Petitioner must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The procedure in a United States District Court is set forth in a law enacted by Congress, 28 U.S.C. §2254, which provides:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedrue the question presented."

The state habeas corpus proceeding may finally determine Fourth Amendment constitutional claims, Stone v. Powell, 428 U.S. 465 (1976), and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction... shall be presumed to be correct..." in the federal proceeding. 28 U.S.C. §2254(d).

The prejudicial effect on Petitioner of the inability to compel the attendance of witnesses is demonstrated by the findings of the habeas corpus court. Having denied Petitioner's motions with respect to the 150 mile limit on subpoenas, the habeas corpus judge nonetheless stated:

> "A number of petitioner's allegations must fail as bare assertions: 'A mere allegation that one has been denied constitutional rights... is not sufficient reason for setting aside a sentence in habeas corpus.' Salisbury v. Grimes, 233 Ga. 776 (1967). Petitioner's allegations

> regarding the relationship of the prosecutor to the family and friends of the victims (H.P. par. 6), the presence of the prosecutor at the State's table (H.P. par. 11), the competency and admissibility of sundry evidence (H.P. pars. 12-13), and alledgedly racist remarks by the District Attorney (H.P. par. 16) have not been substantiated by evidence, real or testimonial, in this habeas proceeding. Thus, Petitioner has not only failed to carry his burden of establishing the factual basis of his contentions, as he must, Sims v. Smith, 228 Ga. 136 (1971); Yancey v. State, 233 Ga. 401 (1974); he has in fact not even undertaken the burden."

(Appendix B) [Emphasis supplied]

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of legislative intent included with 1967 Ga. Laws, p. 835, et seq., a complete revision of the habeas corpus statute:

> "Section I. Statement of Legislative Intent and Purpse.
>
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court, together with other decisions of said court (a)substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this State; that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioration of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases."

Similarly, any analogy of Ga. Code Ann. §38-801(e) with Federal Rule of Civil Procedure 45(e)(1) which limits subpoenas issued by a United States District Court in a federal habeas corpus proceeding to 100 miles of the place of hearing, Pulliam v. Balkcom, 245 Ga. 99, 100, 263 S.E. 123 (1980), is also inappropriate.

The federal habeas corpus statute, 28 U.S.C. §2254, allows venue in a habeas corpus proceeding in either the district of incarceration or the district where the conviction occurred. This alternative venue provision largely eliminates any problem of subpoena mileage limitations.

In contrast, the Georgia habeas corpus statute, Ga. Code Ann. §50-127, limits venue in a habeas corpus proceeding to the county of incarceration; a location which could be (and in Petitioner's case was) far from the site of the convcition and material witnesses.

Petitioner's county of incarceration was more than 150 miles from either Seminole County or Atlanta, Georgia, the locations of his witnesses. Petitioner was denied any means of presenting these witnesses' testimony; he was deprived his right to compulsory process and the right to fully litigate his state petition for writ of habeas corpus.

2. THE TRIAL COURT'S CHARGE TO THE JURY VIOLATED PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW IN THAT IT CREATED AN IMPROPER PRESUMPTION AND RELIEVED THE STATE OF THE BURDEN OF PROOF AS TO AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED.

The entire charge given to the jury at Petitioner's trial is set out in Appendix C; the critical portion of the charge concerning the elements of the offense of murder was as follows:

> A crime is a violation of a Statute of this State in which there shall be a union of joint operation of act and intention.
>
> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.
>
> A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the prosecution must prove beyond and to the exclusion of any reasonable doubt every element necessary to constitute the crime charged. In re Winship, 397 U.S. 358 (1970); Patterson v. New York, 432 U.S. 197 (1977).

Since intent is an element of a criminal offense "it follows that the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act." Morisette v. United States, 342 U.S. at 274. And see, United States v. United States Gypsum, 438 U.S. 422 (1978). It is clear from cases

like Morisette and United States v. Gypsum that a decision on the element of criminal intent is a question of fact left solely to the jury, [see also, Cole v. State, 118 Ga. App. 228, 163 S.E. 2d 250 (1968)] and that if an instruction invades this fact finding function then the defendant's due process rights have been violated in that the State has not been forced to prove "beyond a reasonable doubt...every fact necessary to constitute the crime...charged." In re Winship, 397 U.S. at 364.

In Petitioner's case, after all of the evidence was heard, the Judge read each of the six indictments against the Petitioner and then went on to explain the role of the government in proving the elements of the charges alleged in the indictment.

The court further instructed that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." (T Trial 1033). (Petitioner notes that the jury heard this dictate twice, first during the initial instruction and second when they requested a complete instruction). This instruction and the presumption stated within it had the effect of shifting the burden of proof on the question of malice and intent onto the Petitioner so that the State was no longer forced to prove malice and intent beyond a reasonable doubt.

Both federal and other state courts have held, based on a variety of reasons that the giving of an instruction similar to that challenged by Petitioner is fatal to the validity of a criminal conviction. [See, Chappell v. United States, 270 F. 2d 274 (9th Cir. 1959); Block v. United States,

221 F. 2d 786 (9th Cir. 1955); Berkowitz v. United States, 213 F. 2d 408 (5th Cir. 1954); Wardlaw v. United States, 203 U.S. F. 2d 884 (5th Cir. 1953); Mann v. United States, 319 F. 2d 404 (5th Cir. 1963) cert. denied, 375 U.S. 986 (1964); State v. Warbritton, 214 Kans. 506, 506 P. 2d 1152 (1973); Hall v. State, 272 So. 2d 590, 593 (Ala. Ct. Crim. App. 1973). See also, United States v. Wharton, 139 U.S. App. D.C. 293, 433 F. 2d 451 (1970).

This Court has repeatedly condemned as violative of the Due Process Clause, the practice of shifting the burden of proof to the Defendant in criminal prosecutions by presuming an ingredient of an offense upon proof of other elements of the offense. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). Morisette v. United States, 342 U.S. 358 (1952), and Patterson v. New York, 432 U.S. 197 (1977). And finally in Sandstrom v. Montana, 442 U.S. 510 (1979) this Court held that a trial court instruction to the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated the Fourteenth Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt, and was therefore unconstitutional. In deciding the consitutionality of the charge in Sandstrom, the Court ruled that whether a presumption in a jury instruction deprives a defendant of his constitutional rights is to be determined by the way in which a reasonable juror could have interpreted it, not by a State court's interpretation of its legal import. The Court found that given the common definition of "presume" as "to suppose the

true without proof" [Webster's New Collegiate Dictionary 911 (1974)] and given the lack of any qualifying instructions by the trial court as to the legal effect of the presumption as given, there was a possibility that the jury may have interpreted the instruction in either of two ways:

> First, a reasonable jury could well have interpreted the presumption as 'conclusive' that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent.

Sandstrom v. Montana, 442 U.S. 510, 517 (1979). The Court then held that because the jury may have interpreted the challenged presumption as conclusive, like the presumption in Morisette v. United States, supra; and United States v. United States Gypsum, supra; or as shifting the burden of persuasion, like that in Mullaney v. Wilbur, 421 U.S. 684 (1975) and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction was unconstitutional.

In Petitioner's case as in Sandstrom, no instructions were given to the jury defining the classification, nature or effect of presumptions in criminal proceedings.

This issue was addressed by the United States District Court for the Middle District of Georgia in dealing with a similar instruction in a murder case in a Georgia state court. Holloway v. McElroy, 474 F. Supp. 1363 (M.D. Ga. 1979).

The jury charge examined in Holloway v. McElroy was as follows:

> "I charge you every person is presumed to be of sound mind and discretion, but the presumption may be rebutted. I charge you that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted. I charge you that a person will not be presumed to act with criminal intention, but the trier of facts, and that's the Jury, may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted." (R. 251-52)

474F. Supp. 1363, 1365 (1979).

The court found this charge to be equivalent to the charge declared unconstitutional in Sandstrom, supra. The mere fact that the trial court instructed the jury that the presumption could be rebutted does not cure the charge of its "inherent constitutional infirmity". Holloway v. McElroy, 473 F. Supp. at 1367.

The District Court stated,

> "While the inclusion of the fact that the presumption may be rebutted, might arguably remove it from the category of a mandatory or conclusive presumption, the trial court nevertheless, failed to explain how the presumption might be rebutted, whether by some evidence, a preponderance of the evidence or some other quantum of proof. The effect was to leave the jury with an incomplete statement of the law which in this court's view is no better than had the trial court failed altogether to include the fact that the presumption could be rebutted." [emphasis supplied]

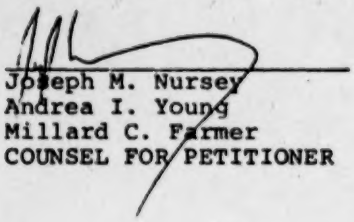
Holloway v. McElroy, 474 F. Supp.1367

The condemned instruction in Holloway is strikingly similar to the instruction in Petitioner's case. As in Sandstrom and Holloway, the instruction in Petitioner's case removed from the State the burden of proving every element beyond a reasonable doubt.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Tattnall County.

Respectively submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party a copy of the foregoing Petition for Writ of Certiorari to the Superiof Court of Tattnall County, by placing same in the United States Mail with adequate postage attached thereon addressed to Mr. Arthur K. Bolton, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 30th day of December, 1980.

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Application No. 1304

SUPREME COURT OF GEORGIA

ATLANTA, October 31, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WAYNE CARL COLEMAN V. CHARLES BALKCOM, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

- APPENDIX A -

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

WAYNE CARL COLEMAN,	§	
	§	
Petitioner	§	HABEAS CORPUS
	§	
VS	§	
	§	
CHARLES R. BALKCOM, Warden, Georgia State Prison	§	CIVIL ACTION NO. 79-61
	§	
Respondent	§	

JUDGMENT

After reviewing the pleadings and evidence offered at trial of this case, it is the judgment of this court that the petition for habeas corpus be, and the same is, denied upon each and every ground thereof. The petitioner is remanded to the custody of the respondent. The findings of fact and conclusions of law upon which this judgment is based shall be recorded as part of the record in the case.

This 18 day of June, 1980.

James E. Findley
Judge Superior Courts
Atlantic Judicial Circuit

-APPENDIX B-

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

WAYNE CARL COLEMAN,	§	
	§	
Petitioner	§	HABEAS CORPUS
	§	
VS	§	
	§	
CHARLES R. BALKCOM, Warden, Georgia State Prison	§	CIVIL ACTION NO. 79-61
	§	
	§	
Respondent	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WAYNE CARL COLEMAN is an inmate at Georgia State Prison, Tattnall County, Georgia, whose liberty is restrained by virtue of a sentence imposed against him in a State court of record. He asserts that in the proceedings resulting in his conviction, there was a substantial denial of his constitutional rights under the Constitutions of the United States and the State of Georgia. The petitioner is among those persons who may file an application for a writ of habeas corpus under the Ga. Code Ann. Title 50-127. The petition is accepted under that code provision and proceedings have been held under it.

Petitioner was convicted of six counts of murder on January 10, 1974, in the Superior Court of Seminole County, Georgia. The death sentence was imposed. Both the conviction and the sentence were affirmed by the Supreme Court of Georgia. Coleman v. State, 237 Ga. 84 (1976). In this proceeding petitioner attacks the legality of his confinement on numerous grounds which this court shall now consider.

Two of the grounds asserted by petitioner, his failure to obtain a change of venue for his trial (H.P. ¶2) and the alleged unconstitutionality of the Georgia death penalty statute, Georgia Code Annotated, §27-2534.1 (H.P. ¶7), have been considered and disposed of by the Supreme Court of Georgia on direct review, Coleman v. State, supra. Both issues were decided adversely to

petitioner and require no further comment, except to restate the comment of the Supreme Court on the direct appeal: "Under this evidence no other verdict could have reasonably been returned by a jury regardless of the locale of the trial." Coleman v. State, supra, at 93 [emphasis added].

A number of petitioner's allegations must fail as bare assertions: "A mere allegation that one has been denied constitutional rights. . .is not sufficient reason for setting aside a sentence in habeas corpus." Salisbury v. Grimes, 223 Ga. 776 (1967). Petitioner's allegations regarding the relationship of the prosecutor to the family and friends of the victims (H.P. ¶6), the presence of the prosecutor at the State's table (H.P., ¶11), the competency and admissiblity of sundry evidence (H.P. ¶'s 12-13), and allegedly racist remarks by the District Attorney (H.P. ¶16) have not been substantiated by evidence, real or testimonial, in this habeas proceeding. Thus, petitioner has not only failed to carry his burden of establishing the factual basis of his contentions, as he must, Sims v. Smith, 228 Ga. 136 (1971); Yancey v. State, 233 Ga. 401 (1974); he has in fact not even undertaken the burden.

Petitioner's contention that the trial judge's failure to recuse himself was "a denial of due process of law and Ga. Code Ann., §24-102" (H.P. ¶10) is without merit. The issue was settled on the direct review of the conviction of one of petitioner's codefendants, George Elder Dungee. Dungee v. State, 237 Ga. 218 (1976). Dungee's complaint, now raised by petitioner, is that the judge was related to the special prosecutor within the sixth degree. As stated by the Supreme Court in Dungee, supra: "We note that although the Code of Judicial Conduct was adopted by this court on December 17, 1973, and made effective January 1, 1974, this trial started on January 7, 1974, and the Code of Judicial Conduct was not printed for delivery to the trial judges of this state until January 31, 1974, after the trial...was completed." Dungee, supra, at 219-220. Petitioner's trial began

on January 14, 1974, and ended on January 18, 1974. His motion to disqualify the presiding judge was made several months earlier, on September 12, 1973, and was overruled and dismissed on October 6, 1973. Thus, the holding of the Supreme Court in Dungee as to Code Ann., §24-102 and the Code of Judicial Conduct is dispositive of petitioner's allegation.

Petitioner further alleges that his grand and traverse jury pools were unconstitutionally composed (H.P. ¶'s 17, 18), but he fails "to establish that his challenge is not controlled by the general rule as to the proper time for such challenges." Banks v. Glass, 242 Ga. 518, 521 (1978), citing Young v. State, 232 Ga. 285, 286 (1974); Barrow v. State, 239 Ga. 162 (1977). Once again the burden is on petitioner, Sims v. Smith, supra, and petitioner has failed to demonstrate that his right to challenge the grand and traverse jury pools was not waived "voluntarily, knowingly, and intelligently." Ga. Laws 1967, pp. 835, 836. Even assuming arguendo that the issues were raised in connection with petitioner's allegation of ineffective assistance of counsel (H.P. ¶1), infra, this Court would not be bound to consider it. Banks v. Glass, 242 Ga. 518, 521 (1978). Nonetheless, petitioner's challenge fails as to both its sufficiency and its timeliness.

By amended petition petitioner alleges that the jury charge given by the trial court was violative of his Fourteenth Amendment rights as guaranteed by the Constitution of the United States in that it allegedly shifted the burden of proof from the State to petitioner. Petitioner relies in the main on the decision of the United States Supreme Court in Sandstrom v. Montana, ____U.S.____, 99 S.Ct. 2450 (1979), in which the Court found violative of Sandstrom's constitutional rights the following charge to the jury: "The law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 2453. The charge complained of at petitioner's trial was as follows: "A

person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." (T.T., p. 1033) [emphasis added.]

The essence of the Sandstrom opinion as it applies here may be stated, necessarily much condensed, thus: (a) the effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it; (b) conclusive or burden shifting presumptions are unconstitutional deprivations of a defendant's right to due process of law. In the case of defendant Sandstrom, the Court held the instruction unconstitutional "[b]ecause David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in Mullaney, [Mullaney v. Wilbur, 421 U.S. 684 (1975)] or a conclusive presumption like those in Morissette, [Morissette v. United States, 342 U.S. 246 (1952)] and United States Gypsum [United States v. United States Gypsum, 438 U.S. 422 (1978)]. . ." Id. at 2459. However, during the same term in which it decided Sandstrom the Supreme Court held, in County Court of Ulster County v. Allen, ____U.S.____, 99 S. Ct. 2213, 2229-30 (1979), that in the case of a permissive presumption, "the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it is admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary." [Leary v. United States, 395 U.S. 6 (1969)] Moreover, and of signal importance, is the principle, announced by the Court in Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 400 (1973), that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (Emphasis added.)

This question has recently been addressed by the Supreme Court of Georgia in Skrine v. State, 244 Ga. 520 (1979). The charge complained of in Skrine quoted Code Ann., §26-605 and also used language similar to Code Ann., §26-604. In petitioner's case the trial court also charged Code Ann., §26-605 (T.T., p. 1033) and charged the jury fully on the presumption of innocence, that the burden of proof beyond a reasonable doubt lay with the State, and that any doubt in their minds called for acquittal. (T.T., pp. 1031). Finally, in the section of the charge specifically complained of by petitioner, the Court carefully noted the rebuttability of the presumption. In Skrine, the defense offered at trial was self-defense and there was no denial of intent to shoot the victim. In petitioner's case, there was not only no denial of intent; there was an admission by petitioner that he killed all six victims. Coleman v. State, supra, at 85. Our Supreme Court concluded, in Skrine, that "[t]he charges given Skrine's jury on this subject, taken together, create merely a permissive presumption of the type considered in County Court of Ulster County v. Allen...." Id. at 521.

The complete charge of the trial court in petitioner's case was thorough and careful (T.T., pp. 1029-1036). The charge of the trial court considered as a whole, Cupp, supra, including the portion deemed unconstitutionally burden-shifting by petitioner, was fair to petitioner. If any presumption at all, as opposed to a mere inference, was raised by the paragraph in question, it was not, in itself or in context, either conclusive or burden-shifting, and no reasonable juror could have taken it as such. Thus, the charge by the Court in petitioner's trial was constitutionally sound both by the standards enunciated in Sandstrom, supra, and by those set forth in Skrine, supra. Petitioner's challenge to the charge is without merit.

Petitioner's remaining allegation charges his court-appointed trial counsel, Harold Lambert, Esq., with ineffective assistance

(H.P. ¶1). Mr. Lambert has appeared at the first of petitioner's two hearings on the habeas corpus petition, as amended, and has offered testimony as to his role as petitioner's counsel. It is clear from Mr. Lambert's extensive and forthright testimony that counsel had fourteen (14) years experience at the time of petitioner's trial (H.T., p. 78), including close to one hundred (100) criminal trials (H.T., p. 91) and that counsel spent many hours preparing for trial (H.T., pp. 119-120), considered but rejected for strategic reasons challenges to the grand and traverse arrays (H.T., pp. 115-116, 130), and in his closing argument pled with the jury to find mitigating circumstances (H.T., pp. 96-97). Petitioner has had his opportunity of offering evidence to show that he received ineffective assistance of counsel, but the only evidence adduced on this habeas proceeding demonstrates, quite in contrast to petitioner's allegation, that Mr. Lambert provided a painstaking and thoroughly professional defense to petitioner. "The Court does not determine whether the defendant has been denied effective assistance of counsel based upon whether the defendant is convicted or receives the death sentence; rather, the issue is how the case was handled by counsel." Brown v. Ricketts, 233 Ga. 809 (1975). Effectiveness is not measured by hindsight, [Pitts v. Glass, 231 Ga. 638 (1974)], or by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 269 (1968).

Grounds of complaint in the application for relief on habeas corpus have been considered and are determined to be without merit. There has been no denial of any of Petitioner's constitutional rights. The court finds no merit in Petitioner's application and relief is expressly denied upon each and every ground thereof. Petitioner is remanded to the custody of the Department of Offender Rehabilitation who shall return him to the Superior Court of Seminole County forthwith so that a new date can be fixed for his execution. The stay of execution heretofore ordered is terminated.

This findings of facts and legal conclusions is a part of the judgment in this case and shall be filed with the judgment as part of the record.

This 13 day of June, 1980.

James E. Findley
Judge Superior Courts
Atlantic Judicial Circuit

Members of the Jury, the Grand Jury at the September Special Term of this Court returned a Bill of Indictment against Wayne Carl Coleman charging him with the offense of murder in six separate and distinct counts, the specific charge in said Indictment being: that the said Wayne Carl Coleman did, on May 14, 1973, in Seminole County, Georgia, in conjunction and acting in concert with Carl J. Isaacs, George Elder Dungee and Billy Carroll Isaacs, unlawfully and with malice aforethought kill one Ned Alday, a human being, by shooting the said Ned Alday with a pistol, contrary to the laws of said State, the good order, peace and dignity thereof.

Count II. And the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Wayne Carl Coleman with having committed the offense of murder; for that the said Wayne Carl Coleman did, on May 14, 1973, in Seminole County, Georgia, in conjunction and acting in concert with Carl J. Isaacs, George Elder Dungee and Billy Carroll Isaacs, unlawfully and with malice aforethought kill one Jerry Nelson Alday, a human being, by shooting the said Jerry Nelson Alday with a pistol, contrary to the laws of said State, the good order, peace and dignity thereof.

Count III. And the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Wayne Carl Coleman with having committed the offense of murder; for that the said Wayne Carl Coleman did, on May 14, 1973, in Seminole County, Georgia, in conjunction and acting in concert with Carl J. Isaacs, George Elder Dungee and Billy Carroll Isaacs, unlawfully and with malice aforethought kill one Jimmy Cecil Alday, a human being, by shooting the said Jimmy Cecil Alday with a pistol,

-APPENDIX C-

contrary to the laws of said State, the good order, peace and dignity thereof.

Count IV. And the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Wayne Carl Coleman with having committed the offense of murder; for that the said Wayne Carl Coleman did, on May 14, 1973, in Seminole County, Georgia, in conjunction and acting in concert with Carl J. Isaacs, George Elder Dungee and Billy Carroll Isaacs, unlawfully and with malice aforethought kill one Mary Campbell Alday, a human being, by shooting the said Mary Campbell Alday with a pistol, contrary to the laws of said State, the good order, peace and dignity thereof.

Count V. And the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Wayne Carl Coleman with having committed the offense of murder; for that the said Wayne Carl Coleman did, on May 14, 1973, in Seminole County, Georgia, in conjunction and acting in concert with Carl J. Isaacs, George Elder Dungee and Billy Carroll Isaacs, unlawfully and with malice aforethought kill one Aubrey Alday, a human being, by shooting the said Aubrey Alday with a pistol, contrary to the laws of said State, the good order, peace and dignity thereof.

Count VI. And the Grand Jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Wayne Carl Coleman with having committed the offense of murder; for that the said Wayne Carl Coleman did, on May 14, 1973, in Seminole County, Georgia, in conjunction and acting in concert with Carl J. Isaacs, George Elder Dungee and Billy Carroll Isaacs, unlawfully and with malice aforethought kill one Chester Addis Alday a human being, by shooting the said Chester Addis Alday with a pistol, contrary to the laws of said State, the good order,

peace and dignity thereof.

To that Indictment, which includes all counts thereof, the Defendant has entered his plea of not guilty, which plea of not guilty, together with said Indictment, makes the issue which you are to try in this case.

I charge you that the Defendant enters upon his trial presumed by law to be innocent which presumption of innocence remains with him and shields and protects him throughout the entire trial, unless and until the State overcomes that presumption by the introduction of evidence in your hearing and presence of such convincing strength and character as to satisfy your minds and consciences of the guilt of the accused beyond all reasonable doubt of the charge made against him.

I charge you that the burden of proof rests upon the State in this case and before the Jury would be warranted in convicting the Defendant, the evidence must be of such convincing strength as to satisfy the Jury of the Defendant's guilt beyond all reasonable doubt.

The reasonable doubt of the law does not mean a fanciful or capricious doubt; it does not mean a doubt arbitrarily created in the mind of a juror for the purpose of finding an excuse to acquit, but it means a doubt that has some reasonable foundation upon which to rest. A doubt of a reasonable, fairminded, impartial man and juror, who is honestly in search after the truth, and which doubt grows out of the evidence, the want of evidence, or proven circumstances in the case.

Absolute or mathematical certainty is not attainable in legal investigations, but moral and reasonable certainty of guilt meets the requirements of the law. For, whether dependent upon positive or cirumstantial evidence, the true question in all criminal trials is not whether it be possible that the conclusion at which the

testimony points may be false, but whether it is sufficient testimony to satisfy the mind and conscience of the guilt of the accused beyond a reasonable doubt.

I charge you that you are the exclusive judges of the testimony and the credibility of the witnesses. In all criminal cases, the Jury are made judges both of the law and the facts. The law which they are the judges, however, is that law given them in charge by the Court, and applying that law to the facts which they gather from the evidence will arrive at a proper and correct and true verdict.

Direct evidence is that which points immediately to the question at issue. Indirect or circumstantial evidence is that which tends to establish the issue, by proof of various facts and circumstances, sustaining by their consistency the hypothesis claimed. To warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused.

Where any conflict, actual or apparent, arises between the testimony of any of the witnesses, it then becomes the duty of the Jury to reconcile such conflict where they can and when they can, and they ought to so reconcile such conflict as to make all witnesses speak the truth and not needlessly impute perjury to any witness. Unless the Jury can so reconcile such conflict, then it rests exclusively within the Jury's province to determine whom and what the Jury will believe.

In determining where the weight of evidence in the case lies, you may consider all of the facts and circumstances in the case, the witnesses' manner of testifying, their intelligence or want of intelligence, their means and opportunity of knowing the facts to which they testify, the nature of the facts to which they testify,

the probability or improbability of the testimony, their interest or want of interest in the result of the case, the personal credibility of the witnesses, so far as the same may legitimately appear from the trial of the case.

Members of the Jury, the Indictment in this case charges the Defendant, Wayne Carl Coleman, with six counts of Murder. You must consider each of these six counts as separate and distinct charges and you must return a verdict as to all six counts. I remind you that the burden is upon the State of Georgia to prove to you beyond a reasonable doubt that the Defendant committed the offense of Murder and this applies to each and every count in this Indictment and before you would be authorized to return a verdict of guilty as to any particular count in the Indictment, you must be satisfied beyond a reasonable doubt that the Defendant committed the offense of Murder as charged in that particular count. Your verdict must be a unanimous verdict, that is, all of you must agree to the verdict that you return and such verdict must express your individual finding.

A crime is a violation of a Statute of this State in which there shall be a union of joint operation of act and intention.

The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.

A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

Every person is presumed to be of sound mind and discretion, but the presumption may be rebutted.

Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

A person is concerned in the commission of a crime only if he: directly commits the crime; or intentionally aids or abets in the commission of the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed and that he was intentionally a party thereto.

A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

The opinion of experts on any question of science, skill, trade or like questions, shall always be admissible and such opinions may be given on the facts as proved by other witnesses. The weight of expert testimony is always for the Jury to determine. The Jury is not bound by expert testimony or of any witness or witnesses, expert or otherwise, it being within the province of the Jury to give such credit to the testimony of any witness or witnesses as the Jury might see fit to give such testimony under the principles of law given you in charge. The value of expert and non-expert testimony is always a question for the Jury. Expert testimony is not conclusive upon the Jury or entitled to

any more probative value than the Jury chooses to give it.

In this case there is evidence that the Defendant made some incriminating statements. In that connection I charge you that an incriminating statement is one freely and voluntarily made by an accused which only tends to establish his guilt of the offense charged or one from which, together with other proven facts and circumstances, guilt may be inferred by the Jury. In that same connection I charge you that all admissions shall be scanned with care and must be corroborated by other evidence before a conviction can be had.

The testimony of a single witness is generally sufficient to establish a fact. An exception to this rule is made in the case of a felony where the only witness is an accomplice; in such case corroborating circumstances may dispense with another witness. The corroborating circumstances referred to must be such as to connect the Defendant with the perpetration of the crime, and tend to show his participation therein. Murder is a felony.

It is always a question for the Jury to determine who is an accomplice. The test for determining whether a witness is an accomplice is "could the witness himself have been indicted for the offense?" Participation in the commission of the same criminal act, and in the execution of a common intent to commit the same criminal act is necessary to render one criminal, in a legal sense, an accomplice of another.

You must return a verdict as to each and every count in the Indictment.

Should you believe beyond a reasonable doubt that the Defendant is guilty of Murder as charged in all counts of the Indictment, the form of your verdict would be, "We, the Jury, find the Defendant guilty of murder as to each and every count alleged in the Indictment."

Should you believe beyond a reasonable doubt that the Defendant is guilty of murder as to one or more of the counts alleged in the Indictment and do not believe beyond a reasonable doubt that he is guilty of murder as to one or more of the counts alleged in the Indictment, the form of your verdict would be, "We, the Jury, find the Defendant guilty of murder as to Count Number or Numbers," naming the number or numbers of the counts you find the Defendant guilty of, "and we find the Defendant not guilty of murder as to Count Number or Numbers," naming the number or numbers of the counts you find the Defendant not guilty of.

Should you find the Defendant not guilty as to all of the Counts alleged in the Indictment, the form of your verdict would be, "We, the Jury, find the Defendant not guilty of murder under any count."

Whatever your verdict may be, let it be the truth of the case, written on a separate piece of paper furnished to you by the Court. Let it be dated and signed by your Foreman and returned into Open Court.

You may retire to make your verdict.

THEREUPON THE JURY RETIRED TO THE JURY ROOM TO COMMENCE THEIR DELIBERATIONS AT THIS TIME.

ALL EVIDENCE WAS SENT TO THE JURY ROOM WITH THE JURY.

AT A LATER TIME THE JURY RETURNED TO THE JURY ROOM AND WERE SEATED IN THE JURY BOX.

AT THIS TIME ALL COUNSEL FOR THE STATE AND THE DEFENDANT, AND THE DEFENDANT ARE PRESENT IN THE COURT ROOM.

JUDGE: ARE YOU THE FOREMAN?

FOREMAN: YES, SIR.

JUDGE: IS THERE SOME QUESTION THE JURY WANTS TO ASK THE COURT, MR. FOREMAN?

FOREMAN: YES, SIR.

JUDGE: ALL RIGHT, SIR.

FOREMAN: WHAT IS THE CASE NUMBER?

JUDGE: THE CASE NUMBER IS NUMBER 439.

IS THERE SOME OTHER QUESTION THE JURY WANTS TO ASK?

FOREMAN: YOUR HONOR, WE WOULD LIKE TO HAVE HER TO REREAD THE POINTS OF LAW AGAIN.

JUDGE: THE WHOLE CHARGE?

FOREMAN: DO YOU NEED THE WHOLE CHARGE? THE WHOLE CHARGE.

JUDGE: ALL RIGHT, MRS. MANNING, READ THE ENTIRE CHARGE TO THEM AGAIN, PLEASE, MA'AM. INCLUDING . . . DO YOU WANT ALL COUNTS IN THE INDICTMENT READ TO YOU AGAIN, TOO?

FOREMAN: NO.

RECHARGE OF THE COURT

To that Indictment, which includes all counts thereof, the Defendant has entered his plea of not guilty, which plea of not guilty, together with said Indictment, makes the issue which you are to try in this case.

I charge you that the Defendant enters upon his trial presumed by law to be innocent which presumption of innocence remains with him and shields and protects him throughout the entire trial, unless and until the State overcomes that presumption by the introduction of evidence in your hearing and presence of such convincing strength and character as to satisfy your minds and consciences of the guilt of the accused beyond all reasonable doubt of the charge made against him.

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intelligence, their means and opportunity of knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of the testimony, their interest or want of interest in the result of the case, the personal credibility of the witnesses, so far as the same may legitimately appear from the trial of the case.

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A crime is a violation of a Statute of this State in which there shall be a union of joint operation of act and intention.

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A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances

connected with the act for which the accused is prosecuted.

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A person is concerned in the commission of a crime only if he: directly commits the crime; or intentionally aids or abets in the commission of the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed and that he was intentionally a party thereto.

A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

The opinion of experts on all question of science, skill, trade or like questions, shall always be admissible and such opinions may be given on the facts as proved by other witnesses. The weight of expert testimony is always for the Jury to determine. The Jury is not bound by expert testimony or of any witness or witnesses, expert or otherwise, it being within the province of the Jury to give such credit to the testimony of any witness or witnesses as the Jury might see fit to give such testimony under the principles of law given you in charge. The value of expert and non-expert testimony is always a question for the Jury.

Expert testimony is not conclusive upon the Jury or entitled to any more probative value than the Jury chooses to give it.

In this case there is evidence that the Defendant made some incriminating statements. In that connection I charge you that an incriminating statement is one freely and voluntarily made by an accused which only tends to establish his guilt of the offense charged or one from which, together with other proven facts and circumstances, guilt may be inferred by the Jury. In that same connection I charge you that all admissions shall be scanned with care and must be corroborated by other evidence before a conviction can be had.

The testimony of a single witness is generally sufficient to establish a fact. An exception to this rule is made in the case of a felony where the only witness is an accomplice; in such case corroborating circumstances may dispense with another witness. The corroborating circumstances referred to must be such as to connect the Defendant with the perpetration of the crime, and tend to show his participation therein. Murder is a felony.

It is always a question for the Jury to determine who is an accomplice. The test for determining whether a witness is an accomplice is "could the witness himself have been indicted for the offense?" Participation in the commission of the same criminal act, and in the execution of a common intent to commit the same criminal act is necessary to render one criminal, in a legal sense, an accomplice of another.

You must return a verdict as to each and every count in the Indictment.

Should you believe beyond a reasonable doubt that the Defendant is guilty of Murder as charged in all counts of the Indictment, the form of your verdict would be, "We, the Jury, find the Defendant guilty of murder as to each and every count alleged in the

Indictment."

Should you believe beyond a reasonable doubt that the Defendant is guilty of murder as to one or more of the counts alleged in the Indictment and do not believe beyond a reasonable doubt that he is guilty of murder as to one or more of the counts alleged in the Indictment, the form of your verdict would be, "We, the Jury, find the Defendant guilty of murder as to Count Number or Numbers," naming the number or numbers of the counts you find the Defendant guilty of, "and we find the Defendant not guilty of murder as to Count Number or Numbers," naming the number or numbers of the counts you find the Defendant not guilty of.

Should you find the Defendant not guilty as to all of the Counts alleged in the Indictment, the form of your verdict would be, "We, the Jury, find the Defendant not guilty of murder under any count."

Whatever your verdict may be, let it be the truth of the case, written on a separate piece of paper furnished to you by the Court. Let it be dated and signed by your Foreman and returned into Open Court.

You may retire to make your verdict.

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

WAYNE CARL COLEMAN, :

Petitioner :

-vs- :

CHARLES BALKCOM, Warden, Georgia State Prison, :

Respondent :

AFFIDAVIT

State of Georgia

County of Fulton

Andrea I. Young, being duly sworn, states:

I am counsel for petitioner Wayne Carl Coleman in this action, and I make this affidavit based on information and belief. The offer of proof made in support of petitioner's cause is as follows:

I.

The appropriate agent of the news gathering organizations, newspaper, television or radio station corporations specified below would have produced and authenticated the original or a copy of the transcripts of all broadcasts made by the station, all headlines, articles, stories, interviews, columns, editorials, letters, essays, statements, or photographs published by the corporation from May 14, 1973 until May 14, 1975, referring or relating to 1) the death of any or all of the Alday family members which occurred on or about May 14, 1973, in Seminole County, Georgia; 2) the involvement or alleged involvement

-APPENDIX D-

of Wayne Carl Coleman, Carl J. Isaacs, or George Elder Dungee in any of the Alday deaths; 3) the arrest, extradition, pretrial proceedings against, indictment, arraignment, trial conviction, or sentencing of Wayne Carl Coleman, Carl J. Isaacs or George Elder Dungee in connection with any of the Alday deaths; 4) the life, past record, character, legal problems, or statements of Wayne Carl Coleman, Carl J. Isaacs or George Elder Dungee; and/or 5) any actions taken, suggested, or contemplated with respect to either Wayne Carl Coleman, Carl J. Isaacs, or George Elder Dungee by their attorneys. These agents would also have been able to produce all documentary information possessed by or available to the corporation referring to or relating to the station's coverage or to the newspaper's circulation, influence and effects in Seminole County, Georgia, between May 14, 1973 and May 14, 1975, including but not limited to the station's Arbitron figures and ratings or the newspaper's ABC audit, ratings, and figures.

This testimony would be admissible in evidence and would demonstrate that because of the overwhelming pretrial publicity in Seminole County and the surrounding areas, Wayne Carl Coleman was unable to receive a fair trial in Seminole County as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Georgia.

A. Any officer, official employee, or designated agent of:

1) The Associated Press
30 Pryor Street, S.W.
Atlanta, Georgia

2) The United Press International
1211 Williams Street, N.W.
Atlanta, Georgia

3) The Georgia News Network
1800 Peachtree Street, N.E.
Atlanta, Georgia

4) WALB TV
Gray Communications Systems, Inc.
1709 Stuart Avenue
Albany, Georgia 31706

5) WJAZ Radio
Dowdy Brothers Broadcasting Co.
2700 N. Slappey
Albany, Georgia 31702

6) WJIZ Radio
James S. Rivers, Inc.
2700 N. Slappey
Albany, Georgia 31702

7) WQDE Radio
Dave Mack Broadcasting Co.
2804 N. Jefferson
Albany, Georgia 31702

8) WGPC Radio
Albany Broadcasting Co.
2011 Gillionville Rd.
Albany, Georgia 31707

9) The Albany Herald
The Albany Herald Broadcasting Co., Inc.
132 Pine Avenue
Albany, Georgia 31705

10) WWCW and WALG Radio
Albany Radio, Inc.
Dunbar Lane
Albany, Georgia 31702

11) The Bainbridge Post-Searchlight
The Bainbridge Post-Searchlight, Inc.
301 N. Crawford Street
Bainbridge, Georgia 31717

12) WJAD FM and WMGR AM
The Decatur Broadcasting Co.
1609 E. Shotwell St.
Bainbridge, Georgia 31717

13) WAZA Radio
Sowega Broadcasting, Inc.
905 E. Shotwell
Bainbridge, Georgia 31717

14) WSEM Radio
WSEM Radio, Inc.
U.S. Highway 91 North
Donalsonville, Georgia 31745

15) The Donalsonville News
The Donalsonville News, Inc.
120 West 2nd Street
Donalsonville, Georgia 31745

16) The Dothan Eagle
Thomson Newspapers, Inc.
203 N. Oates Street
Dothan, Alabama 36302

17) WTVY TV, Inc.
Highway 52 East
Webb, Alabama 36376

18) WDHN TV
Southeast Alabama Broadcasting Co., Inc.
Highway 52
Dothan, Alabama 36302

19) WECA TV
Allen Communications, Inc.
621 N. Calhoun Street
Tallahassee, Florida 32301

20) WCTV
John H. Phipps Broadcasting Stations, Inc.
State Road 12
Tallahassee, Florida 32303

21) WLVW and WTNT Radio
Robert Ingstad Broadcasting Co.
1157 E. Tennessee
Tallahassee, Florida 32302

22) WBGM Radio
Forward of Florida, Inc.
109 Ridgeland Road
Tallahassee, Florida 32303

23) WANM Radio, Inc.
300 W. Tennessee
Tallahassee, Florida 32301

24) WGLF Radio
Tallahassee Broadcasting Co.
300 W. Tennessee
Tallahassee, Florida 32301

II.

Ed Lightsey
604 N. Slappy Blvd.
Albany, Georgia

Mr. Lightsey was formerly a news reporter with WALB TV during the trial of Wayne Carl Coleman, Mr. Lightsey would have produced, had he been permitted to testify, video-tapes of pretrial and trial publicity surrounding the trials of Wayne Carl Coleman, Carl J. Isaacs, and George Elder Dungee. This testimony would be admissible in evidence to demonstrate that Wayne Carl Coleman was denied his constitutional rights to a fair trial as alleged in the Petition for Writ of Habeas Corpus.

III.

Lawrence Noble, Ph.D.
Professor of Political Science
Atlanta University
55 Walnut St., S.W.
Atlanta, Georgia

Dr. Noble is a content analysis expert and would testify as to his expert analysis of the content of the raw media material presented by the witnesses listed in Part I and the effect of the pretrial publicity on the community. Dr. Noble's testimony would be admissible in evidence to show the adverse pretrial publicity so overwhelmingly prejudiced the community and jurors that it was impossible for Wayne Carl Coleman to receive a fair trial in Seminole County, Georgia.

IV.

The jurors listed below would testify to their knowledge, at the time of the trial of Wayne Carl Coleman, of the trial and convictions of Carl J. Isaacs and George Elder Dungee and the confessions of Wayne Carl Coleman, Carl J. Isaacs, and George Elder Dungee. They will testify as to the widespread discussion of the Alday deaths in Seminole County prior to the petitioner's and to the fact that they, as jurors, were affected in their statutory decision-making process by the adverse pre-trial publicity. All of the persons below reside in Seminole County:

1) Joe Edward Byrd
2) Watson F. Lee
3) David I. Rach
4) J.H. Stewart
5) Tommy Easterwood
6) Billy W. Grantham

7) Cleveland Williams

8) Lucille Waddell

9) Mrs. James R. McDuffie

10) Ann P. Norris

11) Glenda Temples

12) Wayne Dickins

This testimony would be admissible in evidence to demonstrate that Wayne Carl Coleman was denied a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and by the Constitution of the State of Georgia.

V.

The jury commissioners and the jury panel listed below would testify as to the widespread communication and knowledge of the citizens of Seminole County of the deaths of the members of the Alday family on or about May 14, 1973, and of the trial and conviction of Carl J. Isaacs, and George Elder Dungee. They would testify to the overwhelming prejudice against the co-defendants in Seminole County, Georgia at the time of the trial.

The jury commissioners, residents of Seminole County, are:

1) Brandy Trawich, Jr.

2) Earl Mims

3) Jimmie Odom, Jr.

4) Woodrow Jernigan

5) Floyd Newberry

The jury panel in the trial of Wayne Carl Coleman, is as follows:

1) Faren Mae Green

2) Charles Spencer

3) Lula Mae Henry

4) Rossie Virgil

5) J.A. Burkhalter

6) Earnest Barber, Jr.

7) Virginia H. Kelly

8) Katie Temples

9) Grover D. Childree

10) Marvin W. Gardner

11) Mrs. Fred L. Gibbons

12) Ralph Trawick

13) Willie Spence

14) Paul E. Stout

Second Panel of Jurors

15) Evelyn Holley

16) Karen Burke

17) Wilson Roberts, Jr.

18) Donald Sirmons

19) Johnny Roy Parks

20) Mrs. Roy C. Parks

21) Charlie A. Thursby

22) Fred Junior Graham

23) Kline L. Wells

Third Panel of Jurors

24) Danny Johnson

25) Carolyn B. Hornsby

26) E.W. Hand

27) David Gordon

28) Janice Godby

29) J.A. Helms

30) Janice Godby

31) Dennis R. Harrison

32) Louise Myrick

33) Bernard Harris

34) William H. Dukes

35) Curtis G. Hicks

Fourth Panel of Jurors

36) Vester King

37) Mrs. Purgeon North

38) Irene Roberts

39) Mrs. John Ritchie

40) Eli Koonce

41) Billy G. Drake

42) Albert Hention

43) R.E. Williams

44) Eddie Hention

45) Tom Williams

Fifth Panel of Jurors

46) Harry Wilfong

47) G.L. Herring

48) Don Howell

49) William R. Mims

50) Mrs. Earl Thursby

51) Hosie Henry

52) Robert Cleveland Jones

Sixth Panel of Jurors

53) Pearl Leona Baker

54) Mrs. Don Helms

55) John W. Williams

56) Cecil C. Bolton

57) G.L. Durden

58) Mrs. Jack D. Herring

59) Ronnie Stewart

60) Bobby H. Black

61) Angro Brannon

Seventh Panel of Jurors

62) Roger Spooner

63) Wilford Tyler

64) Morris Stuart

65) Betty O. Romine

66) Mr. Spier

67) Easter Mae Pollard

68) Mrs. Troy H. Palmer

69) Eugene Ingram

70) Heyward Brown

71) Michael Hampton

72) Carlton Kelly

73) Evelyn Causby

Eighth Panel of Jurors

74) Ella M. Hutchins

75) John P. Hutchins

76) Gordon H. Clifford

77) W. Ellis Odom

78) Joyce Hines

79) Elizabeth Merkinson

80) Linda K. Moore

81) Harlis Smith

82) Mrs. Robert L. Hines

The testimony of the jury commissioners and the members of the jury panel would be admissible in evidence to demonstrate that Wayne Carl Coleman was denied due process and the right to a fair trial as alleged in the Petition for Writ of Habeas Corpus.

VI.

The testimony of the following expert witnesses would show the racist attitude of the prosecutor towards black persons manifest in the transcript in his conduct during voir dire, juror selection, the guilt or innocence and sentencing phase of the trial. These witnesses would analyze the prosecutor's conduct with respect to its effect on the jury, rendering jurors unable to carefully weigh issues of character in the sentencing phase. This testimony would be admissible to show that Wayne Carl Coleman was denied a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Georgia.

1) Dr. Anna Grant
Chairman, Department of Sociology
Morehouse College
Atlanta, Georgia

2) Dr. James Jones
NIAS
400 East Street, N.W.
Washington, D.C.

3) Dr. Mack Jones
Department of Political Science
Atlanta University
Atlanta, Georgia

VII.

The testimony of the following persons would be admissible in evidence to show that character testimony was available for the sentencing phase of Petitioner's trial:

1) Ms. Donna Jamison
Baltimore, Maryland.

2) Carl J. Isaacs
Georgia State Prison
Reidsville, Georgia

3) Counselor
Baltimore Juvenile Detention Center
Baltimore, Maryland

VIII.

Dan White
Sheriff
Seminole County, Georgia

Dan White was sheriff of Seminole County, Georgia, at the time of the trial of Wayne Carl Coleman, and was a witness for the State at that trial. If permitted to testify, Mr. White could have testified to the hostile community sentiment against Wayne Carl Coleman, Carl J. Isaacs, and George Elder Dungee. This testimony would be admissible in evidence to show that the overwhelming prejudice and hostility evidenced by members of the community of Seminole County against Wayne Carl Coleman, denied Petitioner of his fundamental constitutional rights to a fair and impartial trial and to due process of law.

IX.

Dennis A. York
Supreme Court of Georgia
Judiciary Building
Atlanta, Georgia

Dennis A. York is the Assistant to the Supreme Court of Georgia authorized by Ga. Code Ann. 27-2537(f) to assist the Supreme Court in performing the appellate review task which is under constitutional attack by Petitioner. York has information concerning the methods and procedures employed by the Supreme Court in conducting its comparative case review in capital cases. The testimony of Mr. York would be admissible in evidence to show that appellate review practices in capital cases in Georgia fails to meet Sixth and Fourteenth Amendment standards.

Andrea I. Young

Andrea I. Young

Sworn to and subscribed before me
this 28th day of January, 1980.

Notary Public

My commission expires:

[illegible] Commission Expires Oct. 9th, 19[illegible]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served by mail a copy of the foregoing affidavit to counsel for the opposing party, Mr. William Hill, Esq., 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Ga. 30334, by placing same in a properly addressed envelope with adequate postage attached thereon.

This 28th day of January, 1980.

Andrea I. Young

Counsel for Petitioner

15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303

(404) 688-8116

GEORGIA CODE PROVISIONS

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(e)

(e) Subpoena for a hearing or trial. --At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the county, or at any place without the county that is in within 150 miles of the place of the hearing or tiral specified within the subpoena.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whoses liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

-APPENDIX E-

(1) Grounds for writ.--
Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or priviledge which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--
The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--
The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--
Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other quthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--
Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--
Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

80-5980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WAYNE CARL COLEMAN,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,
Georgia State Prison,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Wayne Carl Coleman, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. In support of said Motion, Petitioner submits the attached Affidavit of Indigency from Wayne Carl Coleman.

Respectfully submitted,

Joseph M. Nursey
Andrea I. Young
Millard C. Farmer
COUNSEL FOR PETITIONER

15 Peachtree St., N.E.
Suite 831
Atlanta, Georgia 30303
(404) 688-8116

80-5980

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-

RECEIVED
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SUPREME COURT, U.S.

WAYNE CARL COLEMAN,

Petitioner,

vs.

CHARLES R. BALKCOM, Warden,
Georgia State Prison,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Wayne Carl Coleman, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer._____

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SUPREME COURT, U.S.

b. If the answer is no, state the date of your last employment and the amounty of the salary and wages per month which you received. I was unemployed prior to my arrest in 1973. Previously, I was employed at odd jobs off and on.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source: Yes____ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

Yes X No_____

a. If the answer is yes, state the total value of the items owned. $13.85 in prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No X

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wayne C. Coleman
WAYNE CARL COLEMAN

STATE OF GEORGIA
COUNTY OF BUTTS

Sworn to and subscribed before me this 19th day of December, 1980.

Pamella Pumkle
NOTARY PUBLIC

My commission expires: Aug 20, 1984

NO. 80-5980

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

WAYNE CARL COLEMAN,

Petitioner,

v.

CHARLES R. BALKCOM,
WARDEN, GEORGIA STATE PRISON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF DEKALB COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3499

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel of Record for
the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

QUESTIONS PRESENTED

1.

Whether the provisions of the Georgia statute [Ga. Code Ann. § 801(e)], which was in existence at the time of Petitioner's state habeas corpus hearing and which limited the subpoena power of the state habeas court to 150 miles within the hearing site, violated Petitioner's Fourteenth Amendment right to due process of law and Sixth Amendment right to compulsory process of witnesses.

2.

Whether the trial court's charge to the jury unconstitutionally shifted the burden of proof to the Petitioner on an essential element of the crimes charged or alternatively relieved the State from its burden of proving each essential element of said crimes in violation of Petitioner's Fourteenth Amendment right to due process.

3.

Assuming arguendo, the trial court's instructions to the jury were erroneous, whether or not said error was harmless in light of the facts of this case.

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Ga. Code Ann. § 38-801(e) . . . . . i, 4, 5, 6,

Ga. Code Ann. § 50-127(7) 6

PART ONE

STATEMENT OF THE CASE

Petitioner, Wayne Carl Coleman, was separately indicted along with his co-defendants, Billy Isaacs, Carl Isaacs and George Dungee, for the May 14, 1973, murders of six members of the Alday family in Seminole County, Georgia. Following a jury trial Petitioner was found guilty on January 17, 1974, and was sentenced to death.

Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia on direct appeal. Coleman v. State, 237 Ga. 84, 226 S.E.2d 91 (1976). His application for certiorari was thereafter denied by this Court. Coleman v. Georgia, 431 U.S. 909 (1977), rehng. den., 431 U.S. 961 (1977).

Following the denial of certiorari Petitioner filed for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. Following a hearing, the State habeas court, on June 13, 1980, denied Petitioner's requested relief, and on October 31, 1980, Petitioner's application for a writ of probable cause to appeal to the Supreme Court of Georgia was denied. (See Appendices A and B to Petitioner's Brief). Thereafter, Petitioner filed this second petition for the writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

As noted in the previous section of his brief, Petitioner and his co-defendants were indicted for the murders of the six members of the Alday family in Seminole County, Georgia. Petitioner was tried separately from his co-defendants, and a detailed rendition of the facts as adduced at his trial, is set out in the opinion of the Georgia Supreme Court, Coleman v. State, supra. (Respondent's Appendix A). The evidence showed that on May 14, 1973, the Petitioner and his three co-defendants drove to the residence of Jerry Alday. The residence was unoccupied at the time the four arrived, and the Petitioner and one of his companions entered for the purpose of burglary. Shortly thereafter two members of the Alday family, Jerry and his father, Ned, arrived home and were promptly escorted from their jeep into their mobile home at gunpoint, and were shot several times in the head at close range.

Another member of the family, Jimmy Alday, arrived at the residence, and after being forced to empty his pockets, he was killed with a handgun also fired at close range. Jerry's wife, Mary, then arrived, and she was also apprehended at gunpoint. In the meantime, two other members of the Alday family, Aubrey and Chester, Jerry's uncle and brother, drove up in a pickup truck. Mary Alday was taken into the bathroom while Aubrey and Chester Alday were each taken at gunpoint into one of the bedrooms and were shot in the head.

Mary Alday was then raped by two or more of the men including the Petitioner. She was then taken, bound and blindfolded, in her car to a nearby wooded area where she again was raped, was beaten, and when she refused to commit oral sodomy her breasts were mutilated. She was then shot and killed.

Fingerprints of the Petitioner and his co-defendants were found at the Alday residence, on an auto found near Mary Alday's body, and on another automobile found in Alabama. Petitioner and his companions were eventually arrested in West Virginia a few days following the murders. At the time of the arrests in West Virginia, three handguns were found, and ballistics comparisons revealed that these weapons were used in the murders. One of the co-defendants still was in possession of Mary Alday's watch. During Petitioner's trial, his confession was introduced, wherein he admitted killing all of the victims.

One of Petitioner's co-defendants, sixteen year old Billy Isaacs, testified for the State, and verified that the Petitioner had killed at least two of the victims and was an active participant in the entire event.

In face of all of the above testimony amassed against him, Petitioner rested following the State's case without presenting any evidence.

Additional facts may be recited in the following portion of this brief to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

A. GA. CODE ANN. § 38-801(e) WHICH, AT THE TIME OF PETITIONER'S HABEAS CORPUS HEARING, LIMITED THE SUBPOENA POWER OF THE GEORGIA SUPERIOR COURTS TO 150 MILES, DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL GUARANTEES OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OR PETITIONER'S SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS TO COMPEL ATTENDANCE OF WITNESSES ON HIS BEHALF.

Under the Sixth Amendment to the United States Constitution and under Art. I, Sec. I, Para. V of the Georgia Constitution (Ga. Code Ann. § 2-105), an individual has the right to compulsory process to obtain the testimony of his own witnesses in a criminal trial. However, these constitutional provisions are limited by their own wording to application in criminal proceedings, and there is no specific corresponding constitutional requirement for compulsory process for witnesses in civil proceedings. It has long and consistently been recognized in Georgia that habeas corpus is not a criminal proceeding. Coker v. Smith, 225 Ga. 529, 169 S.E.2d 787 (1969); Johnson v. Smith, 227 Ga. 611, 614 (1971); Sims v. Caldwell, 231 Ga. 377, 202 S.E.2d 70 (1973); Krist v. Caldwell, 230 Ga. 536(7), 198 S.E.2d 172 (1973).

To compel a witness' attendance in a civil proceeding the Superior Courts of Georgia must rely on Ga. Code Ann. § 38-801 which sets out the specific procedure for the issuance of subpoenas. The State Legislature, after creating the Superior

Courts of Georgia (see Art VI, Sec. I, Para. I of the Georgia Constitution, Ga. Code Ann. § 2-3001), also established the judicial limitations on said courts. See, Ga. Code Ann. § 24-2615. In the case of Ga. Code Ann. § 38-801(e) which at the time of Petitioner's habeas hearing limited the process of subpoenas to 150 miles from the site of said hearing, it is clear that it was the intent of the State Legislature to set a limit on the ability of the Superior Courts to gain jurisdiction over witnesses beyond the stated mileage limit. The Legislature obviously had determined that the 150 mile limit best served the interests of sparing undue burdens to witnesses and of establishing realistic boundaries to the jurisdictional reach of the trial courts. The provisions of Code § 38-801(e), it should be noted, are applicable to hearings as well as trials. Brown v. State, 238 Ga. 98, 99, 231 S.E.2d 65 (1976); Clark v. Board of Dental Examiners, 240 Ga. 289, 240 S.E.2d 250 (1977).

It should also be noted that the Georgia State Legislature recently exercised its discretion to amend the aforesaid Code Section to allow subpoenas to be served "at any place within the State." (Ga. Laws 1980, pp. 70-71, effective February 15, 1980). However, Petitioner's habeas corpus hearing was held before this change in the statute, and thus it was not applicable to his hearing.

Additionally, the law in Georgia requires that when a witness resides outside the county where testimony is to be given, service of the subpoena, to be valid, must be accompanied by the tender of witness and mileage fees as required by Ga. Code Ann. § 38-801(d). At the time of Petitioner's state

habeas corpus hearing that Code Section required that witness fees of $4.00 per diem and mileage fees of .08 per mile be tendered to validate any subpoenas issued by the Petitioner. [1/] The Petitioner in this case made no showing that he complied with the requirements of the statute. As noted previously, the Georgia Courts have consistently held that habeas corpus is not a criminal proceeding, and furthermore have held that there is no requirement under Georgia law that a trial court subpoena witnesses for a habeas corpus petitioner. Krist v. Caldwell, supra; Snell v. Smith, 228 Ga. 249, 184 S.E.2d 645 (1971); Johnson v. Smith, 227 Ga. 611, 182 S.E.2d 101 (1971); Neal v. Smith, 226 Ga. 96, 98, 172 S.E.2d 684, 686 (1970).

Petitioner had alternative methods of producing evidence before the court under Ga. Code Ann. § 50-127(7)[2/] and which he may have chosen to utilize. In the instant case, Petitioner made no showing that he attempted to secure the testimony of his potential witnesses through any of the alternative means available to him. Thus, this Court should find that the operation of Ga. Code Ann. § 801(e) in Petitioner's state habeas corpus action denied him neither his constitutional right to compulsory process of witnesses nor due process of law.

1/ Ga. Laws, 1980, pp. 70-71 also amended the mileage and witness fees by raising same to $10.00 per diem and .20 per mile.

2/ Code § 50-127(7) provides that: "(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

B. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY NEITHER UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE PETITIONER NOR RELIEVED THE STATE FROM ITS BURDEN OF PROVING EACH ESSENTIAL ELEMENT OF THE CRIME FOR WHICH PETITIONER WAS CHARGED, AND ALTERNATIVELY, IF SAID INSTRUCTIONS WERE ERRONEOUS, SAID ERROR WAS HARMLESS BEYOND ALL REASONABLE DOUBT IN LIGHT OF THE FACTS IN THIS CASE.

Petitioner's second argument asserts that the trial court's charge to the jury during his criminal trial operated to shift the burden of proof to the Petitioner on the question of malice and intent, thus relieving the state from having to prove said issues beyond a reasonable doubt. The entire charge to the trial court is set out in Petitioner's Appendix C, and need not be repeated in this Brief; however, it may be advantageous to focus upon certain relevant portions as they relate to the issues raised here. As noted in the Petitioner's brief, the trial court instructed the jury as follows:

> "A crime is a violation of a Statute of this State in which there shall be a union of joint operation of act and intention.
>
> The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted.

A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted." (T. 1033, 1041).

In addition to the aforesaid, the trial court also charged as follows:

"A person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.

Every person is presumed to be of sound mind and discretion, but the presumption may be rebutted." (T. 1033-1034, 1041-1042).

* * *

"I charge you that the Defendant enters upon his trial presumed by law to be innocent which presumption of innocence remains with him and shields and protects him throughout the entire trial, unless and until the State overcomes

that presumption by the introduction of evidence in your hearing and presence of such convincing strength and character as to satisfy your mind and consciences of the guilt of the accused beyond all reasonable doubt of the charge made against him.

I charge you that the burden of proof rests upon the State in this case and before the jury would be warranted in convicting the Defendant, the evidence must be of such convincing strength as to satsify the jury of the Defendant's guilt beyond all reasonable doubt." (T. 1031).

The court also went on to define resonable doubt, and the elements of malice murder. (T. 1031, 1034, 1042).

In analyzing the aforesaid jury instructions, it is axiomatic that the trial court's charge must be considered as a whole. Cupp v. Naughten, 414 U.S. 141, 147 (1973). Careful attention must be afforded to the words actually spoken to the jury, although their interpretation may require reference to state case law. County Court of Ulster County v. Allen, ___U.S.___, 99 S.Ct. 2213, 2225 (1979). "Whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, ___U.S.___, 99 S.Ct. 2450, 2454 (1979).

It is clear from the prior decisions of this Court that in a criminal case it is incumbent upon the State to prove every element of the alleged offense beyond a reasonable doubt, and a state may not shift the burden of proof to the defendant on an essential element of the crime by presuming that ingredient upon the showing of other elements of the offense. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). Nevertheless, permissive inferences or presumptions which allow - but which do not require - the trier of fact to infer an elemental fact from proof by the state of a basic fact, place no burden on the accused, and are not unconstitutional unless, under the facts of the case, there is no rational way the trier of fact could have made the connection as permitted by the inference. Ulster County, supra, ___U.S.___ at p. ___, 99 S.Ct. at p. 2224. Ultimately the test of a presumption's constitutional validity in any given case depends upon whether the evidentiary device underminds the fact finder's responsibility at trial, based upon evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. Id., citing In Re Winship, 397 U.S. 358, 364 (1970) and Mullaney v. Wilbur, supra, at pp. 702-703, n. 31.

In the recent case of Tucker v. State, 245 Ga. 68, 263 S.E.2d 439 (1980), the Georgia Supreme Court considered the same instructions as those challenged in the case sub judice. Citing Skrine v. State, 244 Ga. 520, 260 S.E. 500 (1979), supra, it analyzed similar instructions in light of Sandstrom, supra, the Georgia Supreme Court concludsd these instructions did not create the kind of mandatory presumptions which could have been interpreted by reasonable jurors as being either conclusive or

burden shifting. Tucker at p. 71. In Tucker, the Georgia court also noted that intent was really not at issue in the case, and that contrary to the Sandstrom jury, Tucker's jury had been informed that the presumption could be rebutted. In both Skrine and Tucker the Georgia Supreme Court concluded that the instructions created merely permissive presumptions which were not inherently unconstitutional, but which are to be tested by the "rational connection" test of Leary v. United States, 395 U.S. 6 (1969). Under the Leary test it must be decided whether the fact to be presumed is more likely than not to flow from the proven fact. Id. at p. 36. In Skrine the Georgia court found that it was obviously more likely than not that a normal defendant intends the natural and probable consequences of his acts, and the presumption was entirely rational. Skrine at p. 521.

Petitioner emphasises this Court's recent decision in Sandstrom v. Montana, in support of his argument. Of course in that case the defendant had been accused of deliberate homicide and he admitted killing the victim, but denied that he had done so purposefully or knowingly. Thus, his intent was the key issue, indeed the only issue in the case. Sandstrom at p. 2457-2458. Also in Holloway v. McElroy, 474 F.Supp. 1363 (M.D. Ga. 1979), aff'd. in part, ___F.2d ___(5th Cir. Slip Op. 79-3325, Dec. 11, 1980), the key issue was whether the defendant had acted in self-defense or whether his actions were at most, voluntary manslaughter. In affirming Holloway, in part only, the Fifth Circuit held that insofar as the district court's decision was based on alleged errors in that portion of the trial court's charge which dealt with presumptions on intent

(the same instructions as challenged in this case) the district court's opinion must be regarded as dictum. Holloway, ___F.2d___, Slip Op. at p. 1969-1970."

As noted previously, the Petitioner in this case was charged with six counts of murder. The State produced a voluminous amount of incriminatory evidence including the testimony of one of the Petitioner's co-defendant's, the finding of Petitioner's fingerprints at the scene, and Petitioner's own confession. Petitioner put up no evidence in his defense, and there was really no issue presented to the jury on the question of whether or not the victims had been murdered or concerning Petitioner's intent.

In light of the aforesaid, Respondent concludes by submitting that the Georgia Supreme Court correctly has held that instructions similar to those challenged in this case do not shift the burden of proof to the defendant, nor relieve the State from proving all the elements of the crime, but merely call upon the defendant to go forward with some evidence. Tucker v. State, supra; Skrine v. State, supra; Patterson v. State, 239 Ga. 409, 416, 238 S.E.2d 2 (1977). Nevertheless, assuming arguendo this Court finds that said instructions were erroneous, it is apparent beyond reasonable doubt that said instruction did not contribute to the Petitioner's conviction, and were therefore harmless. Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969).

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari which has been filed on behalf of Petitioner, Wayne Carl Coleman.

Respectfully submitted,

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APPENDIX A

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30548. COLEMAN v. THE STATE.

JORDAN, Justice.

Defendant Wayne Carl Coleman was indicted on September 4, 1973, by the grand jury of Seminole County and charged with six counts of murder occurring on May 14, 1973, as follows: (1) Ned Alday, (2) Jerry Nelson Alday, (3) Jimmy Cecil Alday, (4) Mary Campbell Alday, (5) Aubrey Alday, and (6) Chester Addis Alday. On January 18, 1974, after finding the defendant guilty on all six counts of murder and after finding statutory aggravating circumstances as to each, the jury fixed the punishment at death by electrocution on each count. The case is here on appeal and for mandatory review of the death sentences. The record was filed in this court on October 15, 1975. After extensions of time granted to the defendant and the state for filing briefs, the case was argued in January, 1976.

The state presented evidence from which the jury was authorized to find the following facts: On the afternoon of May 14, 1973, defendant and three others, Billy Isaacs, Carl Isaacs, and George Dungee, drove to the residence of Jerry Alday located in Seminole County near the City of Donalsonville. The residence, a mobile home, was unoccupied at that moment. The defendant and one of his companions entered the mobile home for the purpose of burglary. Shortly thereafter two members of the Alday family, Jerry and his father, Ned Alday, arrived in a jeep, were escorted at gunpoint into the trailer, and were shot to death at close range with handguns. Ned Alday was shot seven times in the head by the defendant. Jerry Alday was shot four times in the head.

Shortly thereafter a tractor driven by Jerry's brother, Jimmy Alday, arrived at the trailer. After being forced to empty his pockets, he was placed on the living

room sofa and killed with a handgun fired at close range.

While one of the four was moving the tractor out of the driveway, Jerry's wife, Mary, arrived at her home by car. She was forced into the kitchen, where her purse was emptied. It contained her car keys and a dollar bill. Two other members of the Alday family, Aubrey and Chester, Jerry's uncle and brother, arrived in a pickup truck. Mary was forced into the bathroom while Aubrey and Chester were taken at gunpoint into the bedrooms and shot in a manner similar to the first two victims. The defendant killed Chester Alday with a single shot in the head.

Mary Alday was then raped by two or more of the men, including defendant Coleman. She was then taken, bound and blindfolded, in her car about six miles to a wooded area where she was raped by two of the men, was beaten when she refused to commit oral sodomy, and her breasts mutilated. She was then killed with two shots. Her watch was then removed from her nude body.

The defendant and his companions left the car they had arrived in, and fled in the Alday car, taking with them weapons and money found in the trailer and money found on the victims. The defendant and his companions abandoned the Alday car in Alabama, took possession of another auto, and continued their flight to West Virginia where they were arrested a few days after May 14th.

In his confession, the defendant admitted killing all six of the victims himself but according to the testimony of sixteen-year-old Billy Isaacs who testified for the state, defendant Coleman shot the two victims specified above. The evidence is uncontradicted, however, that each of the six victims was killed by a member of the group.

Defendant Coleman's fingerprints were identified as being on a beer can found in the kitchen of the Alday trailer, and on the car found in the vicinity of Mary Alday's body. Billy Isaacs' fingerprints were found on that same auto as well as on a camera in the Alday home and on the Alday auto found in Alabama. Fingerprints of Carl Isaacs and George Dungee were also found.

At the time of the arrests in West Virginia three handguns were found. Ballistics tests showed that these three weapons caused the deaths of the victims. One of the persons arrested had in his possession a watch identified

as belonging to Mary Alday. The defendant rested without presenting any evidence.

The jury found the defendant guilty of six counts of murder and imposed the death sentence as to each of them. On appeal, defendant enumerates two errors, the overruling of his motion for change of venue and the upholding by the trial court of the constitutionality of the death penalty. In addition, we are required by law to make an independent review of the death sentences. Code § 27-2537 (c).

The crimes described were committed on May 14, 1973. Defendant was arrested on May 18, was indicted on September 4, and his four-day trial commenced on January 14, 1974. Motion for change of venue based upon prejudicial pre-trial publicity and juror partiality was filed on September 20, 1973, was heard on September 27 and was thereafter overruled on October 9. The motion was renewed and amended immediately prior to trial. The amendment added as grounds for change of venue that two other defendants had been convicted and sentenced to death for these same crimes, and that these convictions and sentences were widely publicized and well known in the community and would cause defendant's jury to render guilty verdicts and death sentences. After voir dire and jury selection, the court overruled the motion as amended.

1. The threshhold question in this appeal is whether the trial court erred in overruling the defendant's motion for change of venue based upon prejudicial pre-trial publicity affecting the partiality of the jurors.

The motion was supported by the introduction into evidence of 14 issues of the local newspaper, 38 clippings from the Albany Herald, 24 issues of the Dothan Eagle, and 3 magazine articles. These items cover new stories during the period from discovery of the crimes on May 15, 1973, through the pre-trial hearing on the motion for change of venue. The record contains no news clippings during the three and one-half months immediately preceding the appellant's trial.

Code Ann. § 27-1201 provides for a change of venue in any criminal case where (1) an impartial jury cannot be obtained or (2) if there is a probability or danger of

violence. We are concerned in this appeal with only the question of whether an impartial jury was selected because the record demands a finding that there was no indication of mob violence in Seminole County; that there had been no outbursts or disorder during the preliminary stages of the proceeding or at the actual trial, and absolutely no evidence that the appellant's safety had been threatened in any manner. As is our duty we must then look to the voir dire record of examination of prospective jurors in an effort to determine whether or not an impartial jury could have been and was obtained for the trial of this appellant in Seminole County.

In considering this question this court fully recognizes the well established principle that a trial before a fair and impartial jury is a basic requirement of due process. We also recognize the right of the news media to report the factual happenings surrounding a crime and to report accurately a trial based thereon. To restrict the right of the press in this regard would be inconsistent with the First Amendment and with the right of the public to a free flow of information. This right of the media, however, must not be allowed to interfere with the judicial calm which must surround a trial free from emotionalism and sensationalism. The courts have attempted to balance these equities. It was stated in United States v. McNally, 485 F2d 398, 403 (8th Cir., 1973), "Just because, however, there has been widespread or even adverse publicity is not in itself grounds to grant a change of venue. As stated in Irvin v. Dowd, 366 U. S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751 (1961), an important case draws public attention through 'swift, widespread and diverse means of communication' and hardly any prospective juror 'will not have formed some impression or opinion as to the merits of the case.' The proper test is whether the prospective juror 'can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Irvin v. Dowd, supra, at 723."

With these principles in mind let us now turn to an examination of the voir dire record in this case.

The record before us shows the very extensive (490 typewritten pages) voir dire questioning of the prospective and selected jurors. The record shows that the

prospective and selected jurors were questioned for approximately five to twenty minutes each by the state's counsel and counsel for the accused. The record establishes beyond doubt that the jurors selected stated that nothing they had seen, heard, or read had caused them to form an opinion for or against the appellant and that they had no fixed opinion as to the appellant's guilt or innocence. The range of the questions included whether or not the juror understood that the appellant was presumed innocent until proven guilty beyond a reasonable doubt; whether the juror understood at the moment of questioning that the appellant was presumed innocent; that the juror understood that the burden was on the state to prove guilt of the defendant beyond a reasonable doubt; that each juror's mind was perfectly impartial between the state and the accused; and that the verdict rendered by them would be determined by the evidence presented on the trial. All the selected jurors responded appropriately to these questions and in a manner satisfactory to counsel for the appellant. We note here that counsel for the appellant did not exhaust all of his peremptory challenges prior to the selection of the jury.

In addition to the answers to these general questions, the selected jurors testified on voir dire examination as follows:

Juror No. 1 - That he knew the victims only when he saw them; that he did not attend the funeral; that he knew that two of the other defendants had been tried and convicted; that he had read a lot about the cases in the newspapers and had seen and heard about the homicides on television, but that these things did not make him think the defendant was probably guilty;

Juror No. 2 - That he had worked with two of the victims but had never visited in their home, nor had they visited him in his home; that he did not attend the funeral; and that while he knew of the other trials and had read newspaper articles and had heard about the crimes on television and radio that these reports had not swayed him one way or the other;

Juror No. 3 - That he did not know any of the victims; did not attend the funeral; and although he had read and heard about the case on television and radio and that the

publicity indicated that the defendant was guilty, he felt that he could be an impartial juror;

Juror No. 4 - That he lived 5 or 6 miles from the scene of the crime and was acquainted with the victims but did not attend the funeral; that he had read and heard the news accounts of the crime and knew that two other cases had been tried with verdicts of guilty;

Juror No. 5 - That he did not know the victims and did not attend the funeral; that while he had read news reports and knew about the trial he was not swayed by them.

Juror No. 6 - That he had met one of the victims five or six years before the incident because of an insurance claim but did not attend the funeral; that he had read and heard news of the homicides and of the trials;

Juror No. 7 - That he was acquainted with all the victims except Mary Alday; that he lived some 8 miles from them; that he did attend the funeral; that what he had read and heard would not incline his mind towards defendant's guilt;

Juror No. 8 - That she was acquainted with all the victims except Mary Alday but did not know them well enough to visit in their home or to have them visit in hers; that she did not attend the funeral; that she had read newspapers and knew the outcome of the other trials;

Juror No. 9 - That she did not know the victims; that she did not attend the funeral; and that she knew the outcome of the other trials;

Juror No. 10 - That she knew some of the victims by sight only; that she did not attend the funeral; that she had read newspapers and magazine articles about the matter but felt that she could be impartial;

Juror No. 11 - That she did not know the victims; that she had read about the cases and prior convictions but felt that she could be impartial;

Juror No. 12 - That he did not personally know the victims; had read news reports of the homicides and knew that there were two prior convictions; and that he had not discussed the case.

The record in this case shows that 106 prospective jurors were examined and that twenty of these were excused initially for personal reasons (children, health,

hearing, etc.), leaving eighty-six prospective jurors. Of these nine were stricken for normal cause (seven for relationship to the victims or the prosecutors and two for unalterable opposition to the death penalty), leaving seventy-seven prospective jurors who were examined as to having formed or expressed an opinion and other matters. Thirty-eight of these were stricken on the defendant's motion for having fixed opinions as to the guilt of the accused. As noted before the defendant used only nineteen of his twenty peremptory strikes in the selection of the jurors and the state eight of its ten.

In the light of this record we now turn to the Georgia and federal cases on this subject. The law in Georgia is well established, and a myriad of cases so hold, that a motion for a change of venue addresses itself to the sound discretion of the trial judge, and that discretion will not be disturbed on appeal unless it can be shown that there was an abuse of this discretion. *Jarrell v. State*, 234 Ga. 410 (216 SE2d 258) (1975); and *Allen v. State*, 235 Ga. 709, 712 (221 SE2d 405) (1975).

This principle is echoed by the federal cases and was reiterated by the Supreme Court of the United States in the recent case of Ristaino v. Ross, — U. S. — (96 SC 1017, 47 LE2d 258), where it was said "Voir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.' (citing cases). This is so because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.' Rideau v. Louisiana, 373 U. S. 723, 733 (1963)."

Viewing this voir dire record as set forth above we cannot conclude that the trial court abused its discretion in overruling the motion for change of venue. During the voir dire examination there was no showing that the jurors summoned to try the appellant's case had formed such a fixed opinion as to either the guilt or the innocence of the appellant based on news media accounts of the homicides. We find in this case no evidence of the "total inundation of the judicial process by the media" as found by the United States Supreme Court in cases such as Estes v. Texas, 381 U. S. 532 (95 SC 1628, 14 LE2d 543) (1965) and Sheppard v. Maxwell, 384 U. S. 333 (86 SC 1507, 16

LE2d 600) (1966), nor is there any evidence in this record of trial jurors with pre-conceived opinions of the guilt of the accused as was found in Irvin v. Dowd, infra.

A recent Georgia case involving an accused who had kidnapped and buried alive his victim resulted in tremendous unfavorable media publicity concerning the crime and the accused. In reviewing appellant's new trial contention based on such publicity in that case this court stated as follows: "The test as to whether unfavorable newspaper publicity had so prejudiced a case against one accused of a crime that a fair trial cannot be had is whether the jurors summoned to try the case have formed fixed opinions as to the guilt or innocence of the accused from reading such unfavorable newspaper publicity. . . The transcript of the voir dire examination of the prospective jurors . . . shows without dispute that the jurors who were selected to try the accused had formed no fixed opinion as to his guilt or innocence and were perfectly impartial between him and the State, notwithstanding the wide newspaper publicity which was given to the case before the trial." *Krist v. Caldwell*, 230 Ga. 536 (198 SE2d 161) (1973). See also *Dutton v. State*, 228 Ga. 850, 852 (188 SE2d 794) (1972); and *Allen v. State*, supra.

The two federal decisions which give an in depth look at the question of change of venue based upon juror partiality due to pre-trial publicity are Irvin v. Dowd, 366 U. S. 717 (81 SC 1639, 6 LE2d 751) (1961) and Murphy v. Florida, — U. S. — (95 SC 2031, 44 LE2d 589) (1975). In Irvin, the accused was convicted of one murder whereas the pre-trial publicity related to six murders committed in the vicinity of Evansville, Indiana in 1954 and 1955. The events connected with these murders were extensively covered by the news media. Voir dire examination of the prospective jurors showed that from the panel of 430 prospective jurors, 268 were stricken for cause for having fixed opinions as to the accused's guilt. In all, 370 of the prospective jurors, approximately 90% of those examined, entertained some opinion as to guilt, ranging from mere suspicion to absolute certainty. The record further showed that eight of the jurors empaneled to try the case thought the accused was guilty. On the basis of this record the Supreme Court reversed Irvin's conviction and death

sentence.

In Murphy v. Florida, supra, the accused was convicted in Dade County, Florida of breaking and entering, while armed, with intent to commit theft, and assault with intent to commit robbery. He was notorious for his part in an earlier New York museum jewel theft, and his flamboyant life style caused him to be known in the press as "Murph the Surf." He had been convicted of murder and pled guilty to a federal indictment involving stolen securities. Each new case was well publicized. Upon the trial of his case in Dade County, Florida, seventy-eight prospective jurors were questioned, thirty being excused for personal reasons, twenty being stricken peremptorily by the defense and prosecutor with the remaining eight serving as a jury of six with two alternates. On the basis of this record the Supreme Court affirmed Murphy's conviction, distinguishing Irvin v. Dowd, supra, as follows: "In Irvin v. Dowd, for example, the court noted that 90% of those examined on the point were inclined to belief in the accused's guilt, and the court had excused for this cause 268 of the 430 veniremen. In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt." The court went on to say, "In sum, we are unable to conclude, in the circumstances presented in this case, that petitioner did not receive a fair trial. Petitioner had failed to show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice." 44 LE2d 596.

In our opinion the record in this case more nearly parallels the factual situation in the Murphy case, supra, and is distinguishable from the Irvin v. Dowd case.

Another reason for our conclusion that the trial court did not abuse its discretion in overruling the motion for change of venue is the fact that the appellant failed to exhaust all of his peremptory challenges. The general rule is that appellate courts will not reverse the trial court's overruling of a motion for change of venue where the appellant has not exhausted his peremptory challenges. United States v. Moran, 236 F2d 361, (2d Cir.) (1956) (Cert. den., 352 U. S. 909); Haddock v. State, 192 S.

802 (Fla.) (1939); State v. Pearson, 224 La. 393 (69 S2d 512) (1953); State v. Layton, 174 Ore. 217 (148 P2d 522) (1944) (Cert. den., 347 U. S. 924); Meador v. United States, 341 F2d 381 (9th Cir.) (1965); and Bradley v. State, 245 Ind. 324 (198 NE2d 762) (1964). For instance, in this case if the defendant had thought that the one juror who attended the funeral to be impartial for this reason, he could have made use of his unused peremptory strike.

2. Another reason for concluding that the trial judge did not abuse his discretion in this case is that during the trial the state presented an overpowering and overwhelming mass of evidence on the question of the appellant's guilt. The appellant made no effort to refute this mass of evidence in any manner whatsoever. In addition, the state introduced a confession of the appellant in which he freely and voluntarily admitted his active participation as a trigger man in this horrible crime, including the execution style killing of the five male victims and the murder and rape of the female victim. Under this evidence no other verdict could have reasonably been returned by a jury regardless of the locale of the trial.

This court in *Hussey v. State*, 69 Ga. 54, 57 (1882) in denying a new trial based on admitted error, said, "There is no room, at all, for doubt as to his guilt. It is the strongest case, of the sort, ever brought to this court within our knowledge and recollection, and no matter how many trials he might have, the facts and law absolutely demand the verdict of guilty, and such it would be unless both facts and law were outraged by the jury and their oaths violated." This case was cited in *Poole v. State*, 100 Ga. App. 380, 384 (111 SE2d 265) (1959), where it was said, "However, error, to be reversible, must be harmful. In the present case the only evidence in the record is that of the State's witnesses. The defendant offered no evidence and made no statement, and the evidence of the State demands a verdict of guilty. Accordingly, the error of the trial court in failing to exclude the jury is not such as will bring about a reversal in this case. See *Hussey v. State*, 69 Ga. 54; *Slappey v. State*, 6 Ga. App. 526 (65 SE 254); *Bienert v. State*, 85 Ga. App. 451 (69 SE2d 300). This would not be the case had the jury been authorized to

render a verdict for the defendant. Of course, a verdict is never demanded in a criminal case in the sense that the court may direct a guilty verdict. However, where, as here, the defendant makes no statement denying his guilt, and the evidence authorizes only a guilty verdict, such verdict is demanded in the sense that errors occurring on the trial may be harmless." See People v. Westrup, 372 Ill. 517 (25 NE2d 16) (1939), and 24A CJS 927, Criminal Law, § 1894.

After a thorough consideration of this record and in view of the authorities cited above, we firmly conclude that the trial court did not abuse its discretion in overruling the appellant's motion for change of venue.

3. There is no merit in the appellant's attack on the constitutionality of Georgia's Death Penalty Statute (Ga. L. 1973, pp. 159-172; Code Ann. § 27-2534.1). *Coley v. State*, 231 Ga. 829 (204 SE2d 612) (1974) and subsequent decisions of this court.

4. We are required by Ga. L. 1973, p. 159 et seq (Code Ann. § 27-2537 (c) (1-3)) to review all sentences of death as to three criteria.

As to the first, we conclude that the sentences of death imposed in this case were not imposed under the influence of passion, prejudice, or any other arbitrary factor (See Division 1 of the opinion).

Secondly, we conclude that the statutory aggravating circumstances found by the jury (murder while in the commission of burglary and kidnapping as to 5 counts and murder while in the commission of armed robbery, burglary and kidnapping as to 1 count) was supported by overwhelming evidence as to each count.

Thirdly, we have compared the evidence and sentences in this case with similar cases contained in the appendix attached to this opinion. This case involves multiple execution type murders while in the commission of other capital felonies. Wayne Coleman's sentences to death are not excessive or disproportionate to the penalty imposed in similar cases considering the crimes and the defendant.

Judgment affirmed. All the Justices concur, except Ingram, J., who concurs in the judgment only, Hall, J., who concurs in Divisions 3 and 4 and the judgment, and

Gunter and Hill, JJ., who dissent.

ARGUED JANUARY 12, 1976 — DECIDED JUNE 22, 1976.

Murder. Seminole Superior Court. Before Judge Geer.

Tracy Moulton, Jr., Harold Lambert, for appellant.

J. Frank Myers, District Attorney pro tem, Peter Zack Geer, Arthur K. Bolton, Attorney General, Kirby G. Atkinson, Staff Assistant Attorney General, for appellee.

APPENDIX.

Similar cases considered by the court: *Henderson v. State,* 227 Ga. 68 (179 SE2d 76) (1970); *Pass v. State,* 27 Ga. 730 (182 SE2d 779) (1971); *Watson v. State,* 229 Ga. 787 (194 SE2d 407) (1972); *Callahan v. State,* 229 Ga. 737 (194 SE2d 431) (1972); *Sirmans v. State,* 229 Ga. 743 (194 SE2d 476) (1972); *Scott v. State,* 230 Ga. 413 (197 SE2d 338) (1973); *Whitlock v. State,* 230 Ga. 700 (198 SE2d 865) (1973); *Kramer v. State,* 230 Ga. 855 (199 SE2d 805) (1973); *Bennett v. State,* 231 Ga. 458 (202 SE2d 99) (1973); *Howard v. State,* 231 Ga. 186 (200 SE2d 755) (1973); *Hunter v. State,* 231 Ga. 494 (202 SE2d 441) (1973); *Morgan v. State,* 231 Ga. 280 (201 SE2d 468) (1973); *House v. State,* 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State,* 233 Ga. 117 (210 SE2d 659) (1974); *Floyd v. State,* 233 Ga. 280 (210 SE2d 810) (1974); *Chenault v. State,* 234 Ga. 216 (215 SE2d 223) (1975); *Smith v. State,* 236 Ga. 12 (222 SE2d 308) (1976); *Mason v. State,* 236 Ga. 46 (222 SE2d 339) (1976).

HILL, Justice, dissenting.

In reviewing death sentences, this court is required by law (Ga. L. 1973, pp. 159, 165; Code Ann. § 27-2537 (c) (1)) to make three determinations, one of which is to determine whether the sentence of death "was imposed under the influence of passion, prejudice, or any other arbitrary factor." In this review, this court must make its own determination.

Although I can unhesitatingly say that the statutory aggravating circumstances found by the jury are amply supported by the evidence and that, considering the crime and the defendant, the death sentences imposed in this case are not excessive or disproportionate to the penalty

imposed in similar cases (Code Ann. § 27-2537 (c) (2) (3)), I am unable to declare that the sentences were not imposed under the influence of passion, prejudice or other arbitrary factor. I do not say that they were, but I cannot, as the law requires, say that they were not.

The approval by this court of the sentence of death is the most awesome of our responsibilities. When the time for execution of the sentence arrives, the matter will be beyond our control and I want no second thoughts or reservations. I therefore must respectfully dissent for the reasons which follow.

The majority of this court treat change of venue and the approval of the sentence of death as two separate issues. Because of the necessity that I determine whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, I am unable to separate these two issues.

Seminole County has a population of seven thousand according to the 1970 census (four thousand 21 or over) and is located in the southwest corner of Georgia. In addition to the transmission of the news by oral communication, the county residents read the Donalsonville News, published weekly with circulation of 1800 copies in Seminole County. They also read the Albany Herald, published daily with circulation of 518 copies in Seminole County, and the Dothan Eagle. Television stations in Albany, Dothan and Tallahassee are seen in the county. Although the record contains no television tapes or radio scripts, prospective jurors testifying on voir dire recalled having seen or heard news of the Alday murders on TV and radio.

The record contains 14 issues of the weekly Donalsonville News, 38 clippings from the daily Albany Herald, 24 issues of the daily Dothan Eagle, and three magazine articles, all introduced in connection with the September 27 hearing and dated during the period May 15 to September 28, covering the period from discovery of the crimes through the pre-trial hearing on the motion for change of venue. The articles of record report that three of the four men had escaped from a Maryland prison facility where this defendant was serving 10 years for robbery, that a truck had been stolen during the escape, that the

car found near Mary Alday's body belonged to a Richard Wayne Miller, that Mr. Miller was missing, that this defendant had confessed to having killed Miller because Miller witnessed the theft of the truck used in the escape, and that this defendant was taken to Maryland to help locate Miller's body.

The news articles reported that 2,500 people attended the mass Alday funeral where one of the preachers performing the service was reported to have asked the weeping crowd to pray for those responsible for this awful destruction, saying: "I hope and pray that before they close their eyes in death they will come to see what they are."

The Sheriff of Seminole County is reported by the press to have said: "If I had my way about it, I'd have me a large oven and I'd precook them for several days, just keep them alive and let them punish . . . And I don't think that would satisfy me. . . Whenever I'm protecting them, I'm going to do my job and bring them to court, and I hope they'll get justice. . . I don't see where they could put up any plea for mercy. . . The acts of these men are lower than animals. . . If a citizen gets out of hand and starts shooting people up, there's only one way to arrest and that's with a shotgun. . . Any man that believes in God believes in capital punishment. . . I could throw the switch to the electric chair and never lose a minute's sleep."

The voir dire examination shows that of the 77 prospective jurors who were examined as to having formed or expressed an opinion, 38 were stricken on defendant's motion for having fixed opinions as to the guilt of the accused, leaving 39 jurors. The defendant used 19 of his 20 peremptory strikes and the state used 8 of its 10, leaving only 12.

Examination of the voir dire of those prospective jurors stricken peremptorily by the defendant shows that 10 stated that they had formed no opinion as to the guilt of the accused. One such stricken juror expressed the belief that the two men convicted earlier were guilty, conceded that the news articles she read in the Donalsonville paper all referred to all four defendants, acknowledged that she believes what she reads, but felt she could be impartial.

Another such juror expressed the belief that the newspapers "just told what happened." One stated that although he had discussed the two defendants already found guilty, he had not discussed this defendant. Two were related to witnesses and would believe their testimony.

One prospective juror stricken peremptorily by the defendant testified on voir dire that she had known the victims for 8 or 9 years, except that she had known Mary Alday only a little over 2 years, that she had attended the funeral and had read the newspapers and heard the news, that she had testified as a witness for the state in the two prior trials, that she was named to be a witness in this case, and that she had not been influenced by what she had heard and could give the defendant a fair trial. (When called as a witness in this case, she testified that she worked with Mary Alday and that she last saw her at 5 p.m. on May 14. The witness identified the clothing Mrs. Alday had been wearing and identified Mrs. Alday's watch.) Defendant's challenge for cause to this juror was overruled and she was stricken peremptorily.

On voir dire, the twelve jurors who served testified as follows:

Juror No. 1 testified that he knew the victims when he saw them. Although he did not go to the funeral, two days after their deaths he went by the trailer to pay his respects. He knew the two other cases were tried and their outcome and had discussed those trials. He had read a lot about the cases in the newspapers and had seen and heard about the homicides on television and radio. The things he had heard did not make him think the defendant was probably guilty.

Juror No. 2 (later selected as foreman) testified that he had known the victims for eight years and had worked with two of them. They had never visited in his home nor he in theirs and he did not attend the funeral. He knew that two other defendants had been tried and both were found guilty but he had not discussed it with anyone. He had read newspaper articles and heard on television and radio about the crimes. Although the news he had read and heard pointed to defendant's guilt, the reports did not sway him one way or the other.

Juror No. 3 did not know the Aldays. He did know of the prior trials and convictions and he knew that this defendant was the fourth man. Although he had read about the case in the newspaper, he had seen it on television only once or twice. Although the publicity indicated that the defendant was guilty, he felt he could be impartial.

Juror No. 4 lived five or six miles from the trailer and knew all the Aldays but did not attend the funeral. He had read and heard some news accounts and knew that two other cases had been tried and verdicts of guilty returned.

Juror No. 5 did not know the victims. He had read news reports and knew about the trials but was not swayed by them.

Juror No. 6 had met one of the victims five or six years earlier in connection with an insurance claim. He had read and heard news of the homicides and of the trials.

Juror No. 7 knew all of the Aldays except Mary and went to the funeral. He had seen newspaper and television accounts of the crimes and trials.

Juror No. 8 knew all of the Aldays that were killed except Mary but did not know them well enough to visit them and did not attend their funeral. She had read newspapers and knew the outcomes of the other trials.

Juror No. 9 did not know the Aldays. She kept up with the cases on television and by newspaper and had discussed the matter with a friend. She knew the outcome of the earlier trials.

Juror No. 10 knew the victims by sight and had seen newspaper and television accounts of the other trials. She also had read a magazine article about the matter. The information she had read was unfavorable to the defendant but she felt she could be impartial.

Juror No. 11 did not know the victims personally. She had read in the paper about the cases and prior convictions. The information she had read was unfavorable to the defendant and she believed to some extent the things she had read but felt she could be impartial.

Juror No. 12 knew the victims when he saw them but did not know them personally. He had read news reports of the homicides and knew there were two prior

convictions. He had not discussed the case.

In summary, four of the impaneled jurors thought that the publicity indicated that the defendant was guilty but felt that they could be impartial. Another juror attended the Alday funeral and another went to the Alday trailer to pay his respects. A majority of the jurors knew one or more of the victims. All twelve were aware of the outcome of the two earlier trials of co-defendants.

In summary, I personally cannot make the necessary determination that the jury which imposed these sentences of death acted dispassionately. I would reverse and grant the defendant a change of venue. Although another jury from a different venue would be authorized under the law to reach the same verdict, at least I could then declare that I found that its decision as to sentence was not imposed under the influence of passion, prejudice or other arbitrary factor.

I must therefore respectfully dissent.

30604. PHILLIPS v. THE STATE.

GUNTER, Justice.

Appellant was convicted for having committed armed robbery and was sentenced to fifteen years. He has appealed.

The evidence shows that the appellant and three other parties robbed a Magic Market in Albany, Georgia. Shortly after the robbery all four were apprehended in the getaway car which also contained money and checks taken from the store and a pistol.

The appellant and the three parties apprehended with him all made statements, which were reduced to writing, admitting participation in the armed robbery. The statement of each party was also signed by the other three, and the officers taking the statements testified that all four parties admitted that the contents of all four written statements were true.

Appellant contends that his statement was not voluntarily made, and that the admission into evidence of the other three statements against him denied his right to